118-37

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 220.

THE SOUTH BOSTON IRON COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 27, 1883.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 I. *Petition. Filed April* 24, 1880.

In the Court of Claims.

The South Boston Iron Company }
vs. } No. 12323.
The United States. }

Your petitioner, the South Boston Iron Company, complains of the United States, defendants, and respectfully shows:

That petitioner is a corporation existing under the laws of the State of Massachusetts. That on or about the 7th day of March, A. D. 1877, Wm. H. Shock, chief of the Bureau of Steam Engineering in the Navy Department of the United States, acting under the directions of the then Secretary of the Navy, entered into a contract for and on behalf of said defendants with petitioner, by which petitioner agreed to build new boilers for the United States steamers Narragansett and Tuscarora, and also one small boiler for the tugboat Snowdrop, the material for said boilers to be of the best quality, and the workmanship to be first-class in all respects; said boilers, complete for the Narragansett and Tuscarora, to be delivered alongside ship at New York or Boston ready for sea, excepting the erection on board said vessels, or in sections convenient for shipment, as said bureau might determine; and said bureau determined that said boilers should be delivered at New York for shipment; said boiler for the Snowdrop to be delivered at the Navy Yard at Norfolk. Specifications and drawings to be furnished said petitioner by said Navy Department as soon as prepared, for which making and delivery of said boilers for the Narragansett and Tuscarora, as aforesaid, 2 said defendants, by their officers aforesaid, promised and agreed to pay your petitioner 30⅞ cents per pound if said boilers were erected complete and ready for use, and 30¾ cents per pound if delivered, as aforesaid, in sections. For the boiler for the Snowdrop defendants were to pay petitioner 30⅞ cents per pound. Copy of said contract hereto attached, and marked Exhibit "A."

Petitioner further shows that on or about the 10th day of March, A. D. 1877, said officers, acting as aforesaid, entered into another contract with your petitioner by which petitioner agreed to build new boilers for the United States iron-clad monitor "Dictator;" material and workmanship to be furnished and done as under said contract of 7th of March, and specifications and drawings to be furnished by defendants as soon as possible; said boilers to be delivered, complete and ready for use, alongside ship at New York, for which said boilers, so made and delivered, the defendants, by their officers aforesaid, agreed to pay to your petitioner 30⅞ cents per pound. Copy of contract hereto attached, marked Exhibit "B."

Petitioner further shows that the weight of the boilers for said steamers, if made according to said contract, would have been about as follows:

For the Narragansett	221,223	pounds.
For the Tuscarora	239,324	do.
For the Snowdrop	50,234	do.
For the Dictator	567,140	do.
Total weight	1,077,921	do.

That the price to be paid for building and delivering the boilers for the Narragansett and Tuscarora, as aforesaid, at the contract price of 30¾ cents per pound would have amounted to the sum of $141,716.25.

For the Snowdrop, at 30⅞ cents per pound, to the sum of $15,500.

For the Dictator, at 30⅞ cents per pound, $174,404.84.

3 Total amount to be paid on account of all of said steamers, according to said contracts, $331,900.25.

Your petitioner further shows that it has been ready and willing, and has offered to perform said contracts upon its part, of which said defendants had knowledge; but on or about the 16th of March, A. D. 1877, the then Secretary of of the Navy, acting for and on behalf of said defendants, made and entered an order suspending all work by your petitioner under said contracts "until further orders;" and thereafter neither said defendants nor any one for them or on their behalf furnished petitioner with any specifications or drawings for said boilers or either of them, or with any "further orders," but said defendants have wholly neglected and refused and still do neglect and refuse to perform said contracts on their part.

Petitioner further shows that, for the purpose of perfoming said contract on its part, petitioner purchased large quantities of material, expended large sums of money in putting its machinery and works in proper condition, employed skilled workmen, and made all the other necessary arrangements by means of which and because it was necessary that petitioner should be so prepared and continue in readiness to perform said contract, and could not and did not, therefore, contract for other work, as it otherwise might and would; and because, also, of the delay, uncertainty, and depreciation of property resulting from the violation of said contracts by defendants, as aforesaid, petitioner has suffered great loss and damages to wit, in or about $75,000.

Petitioner further shows that the whole cost and expenses to it of making and delivering said boilers as aforesaid would have been about as follows:

For the Narragansett	$38,714 04
For the Tuscarora	41,881 76
For the Snowdrop	8,790 95
For the Dictator	99,246 50

Making in all the total sum of $188,636.19 Petitioner further
4 ther shows that the difference between the contract price for said boilers and what would have been the total cost thereof to petitioner is $143,264.06, which amount petitioner avers would have been its profits upon said contract if the same had not been violated by defendants as aforesaid. Wherefore petitioner claims to

recover from the United States in this suit the sum of $75,000 damages as aforesaid and the sum of $143,264.06 profits as aforesaid and prays judgment therefor and for costs.

GEO. H. WILLIAMS,
Attorney for Petitioner.

Residence of petitioner, Boston, Mass. Residence of counsel, Washington, D. C.

STATE OF MASSACHUSETTS, } *ss:*
County of Suffolk, }

William P. Hunt, being duly sworn, says that he is president of the above-named South Boston Iron Company; that no part of said claim has been assigned by said company, and that after allowing all just credits and offsets said company, as he believes, is justly entitled to the amount claimed in the foregoing petition; that he has read said petition and believes the fact therein stated to be true.

WM. P. HUNT.

Before me—
[SEAL.] WM. H. HART,
Notary Public.

BOSTON, *April* 19, 1880.

EXHIBIT "A."

BOSTON, *March* 5, 1877.

SIR: Having learned that new boilers are required for the United States steamers Narragansett and Tuscarora, now at Mare Island Navy Yard, California, I submit the following propositions for the consideration of the Bureau of Steam Engineering, viz: I will build such new boilers as may be required for the above-named ships, complete in all respects, from drawings and specifications furnished by the Bureau, the material to be of the very best quality and the workmanship to be first-class in all respects.

5 The boilers to be finished complete ready for sea, excepting erection on board the vessels, or in sections convenient for shipment, as the Bureau may determine. The price of the same to be, if erected complete for use, thirty and seven-eighths ($30\frac{7}{8}$) cents per pound; if in sections thirty and three-quarters ($30\frac{3}{4}$) cents per pound, in either case to be delivered alongside ship at New York or Boston, as may be determined by the Bureau. I agree to receive in part payment such old material as may be at the disposal of the Department at the highest market prices. I will also build one small boiler complete in all respects, ready for use, for the tug-boat Snowdrop, now at Norfolk, from designs and specifications furnished by the Bureau, and deliver at Navy Yard, Norfolk, material and workmanship to be of the best quality, price to be thirty and seven-eighths ($30\frac{7}{8}$) cents per pound.

Very respectfully, your obedient servant,

WM. P. HUNT,
President South Boston Iron Company.

WM. H. SHOCK,
Chief of Bureau of Steam Engineering,
Navy Department Washington, D. C.

NAVY DEPARTMENT,
BUREAU OF STEAM ENGINEERING, *March* 7, 1877.

Accepted by verbal directions of the Secretary of the Navy, in obedience to his order of this date.

WM. H. SHOCK,
Chief Bureau Steam Engineering.

NAVY DEPARTMENT,
BUREAU OF STEAM ENGINEERING, WASHINGTON, *March* 7, 1877.

SIR: By direction of the honorable Secretary of the Navy your offer of the 5th instant for boilers for the Narragansett and Tuscarora is accepted upon the terms and conditions named in said letter, the same to be delivered alongside vessel in New York harbor for shipment to Mare Island Navy Yard; also your offer for boilers for
6 tug Snowdrop to be delivered in Norfolk, Va., Navy Yard. The specifications and drawings will be furnished as soon as prepared.

WM. H. SHOCK,
Chief of Bureau.

WM. P. HUNT,
Boston, Massachusetts.

EXHIBIT B.

BOSTON, *March* 3, 1877.

SIR: Having learned that new boilers are required for the iron-clad monitor Dictator, I submit the following proposition for the consideration of the Bureau of Steam Engineering, viz: I will build such new boiler as may be required for the above-named vessel complete in all respects from drawings and specifications furnished by the Bureau; the materials to be of the very best quality and the workmanship to be first-class in all respects, the boiler to be furnished complete, ready for use and erection on board the vessel; the price of the same to be thirty and seven-eighths (30$\frac{7}{8}$) cents per pound, to be delivered alongside ship at New York.

Very respectfully, your obedient servant,

WM. P. HUNT,
President South Boston Iron Company.

WM. H. SHOCK,
Chief of Bureau of Engineering, Navy Department, Washington.

NAVY DEPARTMENT,
BUREAU OF STEAM ENGINEERING, *March* 10, 1877.

Accepted by direction of the honorable Secretary of the Navy in obedience to his order of this date.

WM. H. SHOCK,
Chief of Bureau.

7 NAVY DEPARTMENT,
BUREAU OF STEAM ENGINEERING,
WASHINGTON, *March* 10, 1877.

SIR: By direction of the honorable Secretary of the Navy your offer of the 3d instant for boilers for the United States iron-clad Dictator is accepted upon the terms named in said letter, the same to be delivered alongside ship or Navy Yard wharf (as may be required) in New York. The specifications and drawings will be furnished as soon as possible.

Respectfully,
WM. H. SHOCK,
Chief of Bureau.

WM. P. HUNT,
Boston, Massachusetts.

II. *Traverse. Filed May* 3, 1880.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said
8 Government, the Attorney-*Attorney*-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

III. *Special Plea. Filed May* 3, 1880.

And now comes the Attorney-General, on behalf of the defendants, and denies that the claimant herein is a duly incorporated company, as set forth in claimant's petition.

THOMAS SIMONS,
Ass't Attorney-General.

9 IV. *Findings of Fact and Conclusion of Law.*

This case having been heard before the Court of Claims, the Court, upon the evidence, finds the facts to be as follows:

I.

That claimant was a corporation existing under the laws of the State of Massachusetts prior to and on the 3d of March, 1870, and has continued to exist and still exists as such corporation.

II.

The following correspondence and orders appear among the records of the Navy Department:

BOSTON, *March 5th*, 1877.

Wm. H. Shock, Chief of Bureau of Steam Engineering, Navy Department, Washington.

SIR: Having learned that new boilers are required for the U. S. steamers Narragansett and Tuscarora, now at Mare Island Navy Yard, California, I submit the following proposition for the consideration of the Bureau of St. Engineering, viz: I will build such new boilers as may be required for the above-named ships, complete in all respects, from drawings and specifications furnished by the bureau, the material to be of the very best quality, and the wormanship to be first class in all respects; the boilers to be finished complete, ready for use, excepting erection on board the vessels, or in sections convenient for shipment, as the bureau may determine; the price of the same to be, if erected complete, ready for use, thirty and seven-eighths (30⅞) cents per pound; if in sections, thirty and three-quarter (30¾) cents per pound; in either case to be delivered alongside of ship at New York or Boston, as may be determined by the bureau. I agree to receive in part payment such old material as may be at the disposal of the Department at the highest market prices.

I will also build one small boiler, complete in all respects, ready for use, for the tug-boat Snowdrop, now at Norfolk, from designs and specifications furnished by the bureau, and deliver at navy yard, Norfolk; material and workmanship to be of the best quality; price to be thirty and seven-eighths (30⅞) cents per pound.

Very respectfully, your ob'd't serv't,

WILLIAM P. HUNT,
President South Boston Iron Co.

(Endorsement.)

BUREAU OF STEAM ENGINEERING,
NAVY DEPARTMENT, *March* 7, 1877.

Received at the Navy Department, March 7, 1877.

Accepted by verbal directions of the Secretary of the Navy, in obedience to his order of this date.

W. H. SHOCK,
Ch'f of Bu. St'm. Eng.

10 NAVY DEPARTMENT,
BUREAU OF STEAM ENGINEERING,
WASHINGTON, *March 7th*, 1877.

SIR: By direction of the Hon. Secretary of the Navy, your offer of the 5th inst. for boilers for the Narragansett and Tuscarora is accepted, upon the terms and conditions named in said letter, the same to be delivered alongside vessel in New York harbor for shipment to Mare Island Navy Yard; also your offer for boilers for the tug Snowdrop, to be delivered in the Norfolk Navy Yard.

The specifications and drawings will be furnished as soon as prepared.

Respectfully, WM. H. SHOCK,
Chief of Bureau.

HUNT, WM. P.,
President South Boston Iron Co., Boston, Mass.

Boston, *March* 3, 1877.

Sir: Having learned that new boilers are required for the iron-clad monitor Dictator, I submit the following proposition for the consideration of the Bureau of Steam Engineering, viz.: I will build such new boiler as may be required for the above-named vessel complete in all respects from drawings and specifications furnished by the Bureau; the materials to be of the very best quality and the workmanship to be first-class in all respects, the boiler to be furnished complete, ready for use and erection on board the vessel; the price of the same to be thirty and seven-eighths ($30\frac{7}{8}$) cents per pound, to be delivered alongside ship at New York.

Very respectfully your obedient servant,

WM. P. HUNT,
President South Boston Iron Company.

WM. H. SHOCK,
Chief of Bureau of Engineering, Navy Department, Washington.

Received at the Navy Department, March 8, 1877.

(1st Endorsement.)

Bureau will accept.

G. M. R. *Sec'ty.*

(2d Endorsement.)

Navy Department,
Bureau of Steam Engineering, *March* 10, 1877.

Accepted by direction of the Hon. Secretary of the Navy, in obedience to his order of this date.

W. H. SHOCK,
Chief of Bureau.

Navy Department,
Bureau of Steam Engineering, Washington, *March* 10*th*, 1877.

Sir: By direction of the Hon. Secretary of the Navy, your offer of the 3rd inst. for boilers for the U. S. iron-clad Dictator is accepted, upon the terms named in said letter, the same to be delivered alongside ship or navy yard wharf (as may be required) in New York.

The specifications and drawings will be furnished as soon as possible.

Respectfully,

WM. H. SHOCK,
Chief of Bureau.

WM. P. HUNT,
Boston, Mass.

III.

March 13, 1877, Hon. R. W. Thompson became Secretary of the Navy, and thereupon sent to the claimant the following notice:

11 Navy Department, Washington, *March* 16, 1877.

Gentlemen: You are hereby notified to discontinue all work by you contracted for with this Department or any bureau thereof since

March 1, 1877, until you shall be otherwise directed by the Secretary of the Navy.

Respectfully yours,

R. W. THOMPSON,
Secretary of the Navy.

South Boston Iron Co., South Boston, Mass.

Before March 1, 1877, all appropriations for the repair of vessels for the current fiscal year had been largely overdrawn.

IV.

Neither on the 7th nor 10th March, nor by the 16th March, 1877, had any drawings or specifications been prepared for boilers for the Narragansett and Tuscarora, the tug Snowdrop, nor the Dictator. In November, 1877, drawings were prepared for the boilers of the Snowdrop, and in 1878 they were constructed by the United States at an expense of $12,960.99.

Subsequent to the inception of this suit drawings were prepared for boilers of the Tuscarora, and construction was commenced by the United States. The Dictator and Narragansett were not in commission in March, 1877, nor have they been so since, nor does it appear that any drawings or specifications have yet been prepared for their boilers.

The Tuscarora was not in commission at any time during the year 1877.

V.

Between the 10th and 16th of March, 1877, claimant ordered the material for the construction of the boilers, but the nature of the order, to whom given, and what liability was thereby created does not appear, nor does it appear that any material on the order was delivered or tendered, nor that any payment or claim for damages has been made or demanded.

Since March 10, 1867, claimants have been willing to build the boilers, as proposed in Finding II, but the defendants have not furnished drawings and specifications, nor ordered the work to proceed. But if the specifications and drawings had been furnished claimant could not have commenced work earlier than the end of June, 1877.

From November, 1877, to the commencement of this suit the boiler-shops of the claimant were practically idle. During this time boilers were generally built with very little profit. Claimant had some offers of work from private parties, which were declined.

VI.

That the estimated weights of the boilers, as entered upon the books of the Navy Department, were respectively as follows: For the Tuscarora, 239,000 pounds; For the Narragansett, 220,000 pounds; for the Snowdrop, 40,000 pounds; for the Dictator, 564,874 pounds.

VII.

It had not been determined in March, 1877, that the boilers mentioned in Finding II should correspond to others previously 12 furnished by claimant for the Hartford, Shenandoah, Triana, and Wachusett. The boilers required for the tug and monitor would have been cylindrical, while those furnished had been quadrangular. It is not shown that at the time of the acceptance of the offers of the claimant there was any verbal understanding as to the design, plan, or weight of the boilers in question, or that anything was said by either party to render more definite or certain the offers and their acceptance.

The offers of claimant for construction of the boilers for the Triana, Wachusett, Shenandoah, and Hartford were based upon drawings and specifications previously furnished by the Bureau.

VIII.

The following correspondence was had prior to the commencement of this suit:

RIGGS HOUSE, WASHINGTON, D. C., *March 24th*, 1880.

Hon. R. W. Thompson, Secretary of the Navy.

SIR: You are hereby notified that the South Boston Iron Company claims damages, interest, and expenses of the United States in the sum of two hundred thousand ($200,000) dollars, by reason of the suspension by you of a certain contract made by your immediate predecessor in office (Mr. Robeson) on or about the 7th of March, 1877, which contract was for boilers to be furnished by said company to the Navy Department of said United States, as specified in said contract, and that a suit for the recovery of the same will be commenced immediately.

Very respectfully,

TIMOTHY DAVIS,
Agent and Attorney-in-Fact for the South Boston Iron Company.

RIGGS HOUSE, WASHINGTON, D. C., *March 30th*, 1880.

Hon. Secretary of the Navy.

SIR: I had the honor on the 24th inst. to communicate to you the claim and intentions of the South Boston Iron Company under the contracts made by your predecessor with said company for boilers on or about the 7th and 10th of March, 1877.

I have received no acknowledgment of the receipt of said communication by you, and I have now respectfully to inquire if said communication reached you, and if you have any views to express as to said company's claim for damages, before the commencement of a suit, as indicated in my said letter of the 24th instant.

Very respectfully, your ob't servant,

TIMOTHY DAVIS,
Agent South Boston Iron Company.

NAVY DEPARTMENT, WASHINGTON, *March 30th*, 1880.

SIR: Your letter of the 24th inst. and your letter of this date have been received.

Very respectfully,

R. W. THOMPSON,
Secretary of the Navy.

Timothy Davis, Esq., Ag't South Boston Iron Co., Washington.

And upon the foregoing findings of facts the court decides as conclusions of law—

That the claimant's petition be dismissed.

V. *Opinion of the Court.*

SCOFIELD, *J.*, delivered the opinion of the court.

March 8, 1877, the claimant filed in the Navy Department a letter,
dated Boston, March 3, 1877, proposing to build "such new
13 boilers as may be required" for the iron-clad monitor Dicta-
tor from drawings and specifications furnished by the Bureau
at prices stated. March 10, 1877, claimant was notified by letter
that the proposal was accepted, with a slight change as to the place
of delivery.

March 7, 1877, claimant filed in the Department a second letter, dated Boston, March 5, 1877, proposing to build "such new boilers as may be required" for the steamers Narragansett and Tuscarora, from drawings and specifications furnished by the Bureau, at prices stated therein; also a small boiler for the tug-boat Snowdrop, from designs and specifications furnished by the Bureau. He offers to receive in part payment old material at the highest market price. March 7, 1877, claimant was notified by letter that this proposal was accepted.

March 13, 1877, Hon. R. W. Thompson became Secretary of the Navy, and March 16, 1877, gave notice to the claimant to discontinue all work contracted for since March 1, 1877.

No notice was at any time given that boilers were required for any of these vessels, nor were drawings and specifications ever furnished.

In 1878 boilers were built in the defendant's navy yard at Norfolk, Va., for the tug-boat Snowdrop. For the Dictator, Narragansett, and Tuscarora, prior to the bringing of this suit, no drawings and specifications were made. From March 1, 1877, to May 1, 1880, they were not in commission, and did not require new boilers.

The first question presented for consideration in this case is whether the correspondence, as set out in Finding II, makes a contract binding upon the Government under the provisions of the act of Congress of June 2, 1862, (12 Stat. L., 416.) (Rev. Stats., sections 3744, 3745, 3746, and 3747). The first part of section 3744 provides that—

"It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally, on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing and signed by the contracting parties with their names at the end thereof."

The remainder of this section makes it the duty of the contracting officer to file in the returns office of the Interior Department a copy of the contract, together with all "bids, offers, and proposals."

Section 3745 provides that the contracting officer shall make oath that the paper filed is a true copy of the contract; that it has been honestly made, and that the accompanying papers include all that relate to it.

By section 3746 the failure to file copies is made a crime.

Section 3747 makes it the duty of the Secretaries to furnish contracting officers with a printed letter of instructions, and with forms printed in blank, so that "all the instruments may be as nearly uniform as possible."

This is one of several acts which evince the intention of Congress to place the contracting officers of the Government under the restraints of law. To avoid disputes with contractors, the contracts are to be put in writing. To avoid ambiguities, mistakes, and omissions of detail, and statutory requirements, they are to be drawn up after carefully-prepared legal forms, to be furnished by the Secretaries, and when so up to be signed by the contracting parties with their names at the end thereof. That it may be readily known in what liabilities the numerous contracting officers are involving the Government, sworn copies are to be forthwith filed in one common office.

The English statute of fraud provides that one class of contracts shall be "put in writing and signed by the parties," and for another
class it provides that "the agreement or some memorandum
14 or note thereof shall be in writing and signed by the party
to be charged therewith." The language of these statutes has
been generally followed in legislation of this country. To determine what kind or form of writing and signing came within the requirements of this phraseology has been the object of the great number of judicial decisions, some of which have been cited here.

But in the law under consideration the words "some memorandum or note thereof" are omitted, and the words "with their names at the end thereof" added. Immediately preceding these added words the statute had already provided all that the English statutes required, to wit, that "the contract should be in writing and signed by the contracting parties."

It is plain that some additional requirement is involved in the words "with their names at the end thereof." They are not repugnant to any other part of the act. They cannot be meaningless. The same idea has been discussed in legislative bodies, and one State at least has required certain contracts "to be signed at the foot." Congress inserted these words for a purpose, and courts must give them effect. We cannot shave off the language of an act of Congress to bring its meaning within less restricted language, common in statutes of fraud. These additional words cannot mean less then that the contract shall be so full and complete before signing that it can be signed in whole by both parties. It excludes the idea that one party may sign one part of the contract and the other party another and leave the courts to arrange a contract by collecting and joining the pieces. That can be done, as has been often held, under the English statute, but not under ours, unless we entirely erase the words "with their names at the end thereof."

This construction is strengthened by the other provisions of the act before noted, especially by those which require the Secretaries to furnish blank forms in order "that all the instruments may be as nearly uniform as possible," and the contracting officers to file with the copy of the contracts copies of all "bids, offers, and proposals."

It is doubtless true that the contractor is not bound to see that the officer obeys all these directions, but he is bound to know that they are in the law and that it does not become him to aid a reckless officer to evade them.

If this is the proper construction of the statute, negotiations, correspondence, proposals, and acceptances, although conducted in writing, but signed only in part by one party and in part by the other, do not constitute the required complete contract signed in whole by both parties. At most they are only preliminary memoranda to be used in drawing a contract so complete that it can be "signed by the contracting parties with their names at the end thereof."

In opposition to this construction of the statute the case of Adams (1 C. Cls. R., 192) and the case of Garfielde *vs.* United States (93 U. S. R., 242) are cited. But these cases were not necessarily ruled by the act of June 2, 1862. The accepted proposals, having been made in answer to advertisements soliciting bids, were controlled in the one case by sections 3718 and 3719 of the Revised Statutes, and in the other by act of June 8, 1872 (17 Stat. L., 313).

It may be considered settled that so much of section 3744 as provides that contracts shall be "reduced to writing and signed by the contracting parties, with their names at the end thereof," is mandatory, and contracts which do not comply with its requirements are void. Henderson's case (4 C. Cls. R., 75); Clark *v.* United States (95 U. S. R., 539).

In this case a whole and complete contract was not signed
15 by either party. The claimant signed the proposals and the
defendants the acceptances. Neither party retained possession of all the original parts. The defendants retained possession of the original proposals and the claimant of the origional acceptances. The drawings and specifications, which were to become a very important part of the contract, were not in writing at the time nor even considered and determined upon.

The retiring Secretary, in the hurry of departure, gave verbal orders that the proposals should be accepted, and left it for his successor, if he saw fit, to draw contracts from these memoranda, in conformity to law.

As the appropriation for the current fiscal year was already largely overdrawn, it would be a reflection upon his honesty to suppose that, in violation of section 3679 (Rev. Stat.), he intended, by such immature contracts, to further involve the Bureau in debt, or that, by contracts premature as well as immature, he intended to control the discretion of his successor in the expenditure of an appropriation limited to the necessities of the next fiscal year.

It may be here observed, as illustrative of the wisdom of Congress in endeavoring to provide against involving the Government in large liabilities through unfinished and uncertain contracts, that these papers contemplated payment in old material, in violation of the Revised Statutes, sec. 3618 (Steele's case, 18 C. Cls.), and omitted the provision relative to members of Congress, contained in sec. 3741. For the same purpose the attention of the Court is directed to a small variance between the proposal and the acceptance relative to boilers for the Dictator. The claimant proposed to deliver the boilers "alongside ship," in New York, and the acceptance demanded that they should be delivered "alongside ship or the navy-yard wharf, as may be required." This seems to be only a slight modification, but the Department considered it of sufficient importance to make it a condition in the notice of acceptance. To this modification claimant made no reply. In a suit against the claimant for non-performance could he not set up as a defense this unaccepted modification?

As the requirements of the statute were not complied with, we hold that there was no contract upon which to base a claim for damages, and, as no work was done and no property delivered, there can be no recovery on a *quantum meruit*.

But if it should be held that these papers constitute valid contracts against the Government, it is not at all clear that they have been broken by the defendants. The claimant's proposals state that he has "learned that new boilers are required for" certain ships, and then says: "I will build such new boilers as may be required for the above-named ships," &c. This language implies conditions as to the requirements of the service apparently to be settled in the future. (Fenlon's case, 17 C. Cls., 138.) Whenever the Secretary shall determine (so this language imports) that new boilers are required, claimant will build them on the terms stated. Upon these conditions the proposals appear to have been accepted. In thus accepting, the Secretary passes no present judgment upon the requirements of the navy. All is prospective. No time is fixed or proposed. The Secretary informs the claimant that his terms are satisfactory and that whenever the Government requires the boilers to be built outside of its own shops, drawings and specifications will be made and orders given to him. The three ships were not in commission, and for them the Secretary concluded that new boilers
were not required. About a year afterward the Secretary de-
16 cided that the tug-boat Snowdrop required a new boiler, and
that it was advisable to build it at the Government navy yard.

This comment upon the language of the proposals is made, not for the purpose of present construction, but, by its ambiguity, further to illustrate the propriety of the law which refuses to recognize as valid contracts crude and incomplete memoranda.

It was contended by defendants that so long as plans and specifications had not been selected, consideration of gains prevented was out of the question, for the reason that the discretion reposed in defendants to prescribe plans extended at the least to the selection of a design as expensive to the contractor as the contract price.

The alleged contract is further objected to because it is said that it is in violation of section 3718 (Rev. Stat.), which provides "that all materials of every name and nature for the use of the navy shall be furnished by contract by the lowest bidder."

But, having decided the case upon the provisions of section 3744, it is unnecessary to consider other objections.

The decision of the Court is that the claimant's petition be dismissed.

VI. *Final Judgment of the Court.*

At a Court of Claims held in the city of Washington on the 19th day of February, A. D. 1883, judgment was ordered to be entered as follows:

The Court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant, The South Boston Iron Company, be dismissed.

17 VII. *Application of Claimant for Allowance of Appeal, and Allowance of same.*

From the judgment rendered in the above-entitled cause on the 19th day of February, A. D. 1883, in favor of the defendants, the claimant, by Shellabarger and Wilson, its attorneys, on this fifth day of March, A. D. 1883, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

SHELLABARGER AND WILSON,
Attorneys for Claimant.

Filed March 5, 1883.

And now, to wit, March 5th, 1883, it is ordered by the Court that the appeal be allowed as prayed for.

18 In the Court of Claims.

THE SOUTH BOSTON IRON COMPANY
vs.
THE UNITED STATES.
} No. 12323.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the Court and the conclusion of law thereon, of the opinion of the Court, of the judgment of the Court, of the application of claimant for allowance of appeal to the Supreme Court of the United States, and of the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington, this 17th day of March, A. D. 1883.

[Seal Court of Claims. *Reipublicæ Civibusque.*]

JOHN RANDOLPH,
Ass't Clerk, Court of Claims.

Endorsed on cover: Court of Claims. No. 220. The South Boston Iron Company, appellant, *vs.* The United States. Filed 27th April, 1883.

FILED
APR 6 1886
JAMES H. McKENNEY,
CLERK

118-37

IN THE

Supreme Court of the United States.

THE SOUTH BOSTON IRON CO., Appellant,
vs.
THE UNITED STATES, Appellee.
No. 220.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from the judgment of the Court of Claims dismissing the petition of the claimant.

The facts out of which the case arises are as follows: On March 3, 1877, the appellant having learned that new boilers were needed for the iron-clad monitor Dictator, made a proposal in writing to the Hon. Secretary of the Navy to build such boilers for a price therein specified, to wit, (30⅞) thirty and seven-eighths cents per pound; and on the 5th day of March, 1877, made a similar offer in writing to construct new boilers for the "Narragansett," "Tuscarora," and "Snowdrop" at the same price, or at the rate of (30¾) thirty and three-quarter cents per pound if delivered in sections. These proposals are found on pages 6 and 7 of the record.

On the 7th and 10th of March, 1877, respectively, these proposals were accepted by the Hon. Secretary of the Navy, and the appellants were by letters of said dates from W. H. Shock, Chief of the Bureau of Steam Engineering of the Navy, notified of such acceptance. (Record, pp. 6, 7.)

On the 16th of March, 1877, the then Secretary of the Navy notified the appellants to discontinue all work contracted for with the Navy Department or any of its bureaus since March 1st, 1877, until *otherwise* directed by the Secretary of the Navy. (Record, p. 7.) From that date no further orders were given by the Secretary; and the appellants, after having made the necessary preparations and held themselves in readiness to complete the contracts for a reasonable time, and having so notified the Secretary of the Navy, on April 24th, 1880, brought their suit in the Court of Claims to recover the damages accruing to them and the loss of profits arising from this breach of said contracts on behalf of the United States.

Assignment of Errors.

1. The Court of Claims erred in holding that the written proposals of the appellants and the written acceptances of the appellee did not constitute a valid contract between the parties.
2. That the court erred in holding that section 3744 of the Revised Statutes was mandatory in its directions as to the place of signature.

Brief.

The questions involved in this case are few; in fact, the decision of the court below is based exclusively on the provisions of section 3744 of the Revised Statutes; and having held that there was no valid contract between the parties, because it was not signed by both parties on the same paper at the "end of the contract," no recovery, of course, could be had for gains prevented for the breach of a void contract.

It is submitted that so much of section 3744 as relates to the particular point on the written contract where the names of the parties shall be signed is a matter of form merely and is directory and not mandatory. That statute, following all statutes of similar intent, did not intend to place *form* above substance. The evil that it was intended to remedy did not arise from the place where the signature was to be, but its object and design was to do away with verbal contracts by requiring all contracts to be reduced to writing; the signature was to evidence the fact that the terms were correctly stated. Whether such signatures were at "the end" or on the margin or at the bottom of either party's obligation was a matter of no consequence.

The case of Clark *v.* United States, 95 U. S., 539, it is submitted, is no authority for this rigid and narrow construction of this section. The whole tenor of that decision relates to the substantial requirement of the statute, to wit, reducing the contract to writing. Is a contract more definite in its terms by having both signatures on one paper? Does it tend a particle more to the prevention of fraud and perjury to have the writing all on one paper than it does to have a written proposal and written acceptance? Are not the terms just as definite in the one case as in the other?

That a written proposal and written acceptance thereof creates a contract of equal force and effect as a formal contract written out and signed by the parties is too well settled to be questioned, (Garfielde *v.* U. S., 93 U. S., 242;) and unless this "place of signature" is of controlling force, there certainly existed a valid contract between the parties, for the breach of which the appellants are entitled to recover.

In construing the requirements of the statute of frauds it has been held that there is no restriction as to the place of signature. Barry *v.* Coombs, 1 Peters, 640; Higdon *v.* Thomas, 1 Harr. & Gill, 139; Lemayne *v.* Stanley, 3 Lev., 1; Hawkins *v.* Chase, 19 Pick, 505; Coles *v.* Thecothick, 9 Ves., 234; Sec. 357, Browne on Statute of Frauds, and cases there cited. This court, in Beckwith *v.* Talbot, 95 U.

S., 286, in construing the Colorado statute of frauds, which required the written contract to be "SUBSCRIBED" by the party, held a signature on a collateral paper recognizing the contract, to be sufficient under the statute, although the contract itself was not signed at all. It is submitted that the word *subscribed* is as strong a designation as "signed at the end" of the place of signature.

2d. While the Court of Claims placed their decision entirely upon the provisions of section 3744, still it is intimated that the contract may have been obnoxious to the provisions of sections 3718, 3709.

Section 3718 relates to advertising, "where time will permit," and it embraces supplies and materials only. It is not at all clear that the building of boilers for ships of the navy are embraced in the language of that section; indeed it would be giving a strained and forced construction to it to apply it to this class of work. The safety of vessel depends upon the faithfulness with which the boilers are constructed, and it has been the practice of the Department under this section to exclude from competitive bidding this class of work. The standing and character of the contractors are of more importance for the faithful execution of the work than the *bond* which some speculator might be able to give. When a boiler blows up on account of its defective construction, and hundreds of lives are lost, a suit on the contractor's bond is hardly an adequate remedy. But even though boilers were included in the provision of this section, still a discretion is left with the contracting officer, under both sections, and having exercised it, the validity of the contract is not dependent upon the wisdom of its exercise. (United States *v.* Speed, 8 Wall., 77, 83.)

3d. Another question that the opinion intimates may effect the validity of the contract, is a want of certainty, no specifications being agreed upon.

There can be no uncertainty in a contract when nothing is left to be agreed upon between the parties. In this case there was nothing left to be the subject of discussion or negotiation. The United States were to furnish drawings and specifications. That was a part of their obligations under the contract; the appellant was not to be consulted. Whatever specification was made, bound him; and because of the violation of that provision of the contract by the United States they now seek to escape all liability.

In Harvey *v.* U. S., 8 Court of Claims, 501, a contract exactly similar in this respect was held to be good. The contract referred to specifications to be furnished by the United States, and the failure to furnish them was made the ground of a part of the recovery. Also U. S. *v.* Mueller, 113 U. S., 153.

4th. But it may be urged that in the absence of specifications no certain criterion could be afforded to measure the damages; that without them the accurate cost could not be ascertained, and hence the gains prevented would be speculative.

If this be true, it places a court at the mercy of the wrong-doer, and permits one to so completely violate his contract as to escape all liability. But there is enough in the description of the boilers to render their cost reasonably certain; the weight, the class of vessel, the quantity of material and workmanship, and in some instance the shape is given. The court will not assume that two boilers built to correspond with this description could vary very materially in cost from the slight changes that might appear in two sets of specifications. The standard for the measure of damage—*i. e.*, the difference between the cost of a boiler *suitable* for a vessel of the class designated, built of the best material and with first-class workmanship, and the contract price—is certainly as a safe guide as is usually found in actions for breach of contract.

5th. As to the measure of damages, the appellants rely upon the rule laid down by this court in Speed *v.* U. S., 8 Wallace, 85, endorsing the rule in Masterton *v.* Brooklyn, 7 Hill, 62, to wit, the gains prevented by the violation of the contract. The appellants made préparation for this work, gave orders for material, kept their shops practically idle, refused private work; in all this they suffered actual loss. Part of this might have been lessened if the Secretary of the Navy had repudiated the contracts or denied their validity; but he simply *suspended* the work, thus adding to instead of lessening the actual loss.

JOHN C. FAY,
Attorney for Appellants.

118-37

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

THE SOUTH BOSTON IRON COMPANY,
appellant,
vs.
THE UNITED STATES.
No. 220.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

THE SOUTH BOSTON IRON COMPANY, appellant,
vs.
THE UNITED STATES.
No. 220.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

The opinion of the Court of Claims in this case, to be found in the record, pp. 10, 11, 12, 13, and 14, covers the entire ground so completely that we will not attempt to enlarge upon it. It is clear, we think, that the judgment of the Court of Claims should be affirmed—

(1) Because the findings of fact do not show that there was any contract whatever between the parties. The most that can be claimed from the correspondence is that there was an agreement to contract. The breach assigned is the refusal of the United States to furnish the drawings and specifications. The matter was incomplete, and for the court to say what would have been the profit of the claimant would be for the court to make the contract.

If this were a case between two individuals, the claimant's only remedy would be a bill to compel defendant to furnish the drawings, but no court of equity would compel defendant to make certain and definite the matters which in this correspondence are left uncertain and indefinite.

(2) There was no such contract between the parties as is required by the several sections of the Revised Statutes in relation to public contracts. Section 3709 requires all purchases and contracts for supplies or services in any of the Departments of the Government, except for personal services, to be made by *advertising* a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles or performance of the services. When immediate delivery or performance is required by the public exigency, articles or services required may be procured by open purchase or contract. The findings of fact in this case do not show that there was any advertising for proposals, or that the public exigencies were such as to require immediate performance. Section 3718 requires that all materials, of every name and nature, when time will permit, shall be furnished by contract by the lowest bidder; it is manifest from section 3720 that this includes labor also. If there are any good and sufficient reasons why boilers should be excepted from the general rule as thus prescribed, Congress has not seen fit to insert boilers in the list of exceptions found in sections 3721, 3726, 3727, and 3729. There is no such ambiguity in these statutes as would make common usage a rule of interpretation. (See *Swift Company* vs. *The United States*, 105 U. S. Rep., 691.) In the case of *Clark* vs. *The United*

States (95 U. S. Rep., 539), this court decided that the act of Congress approved June 2, 1862 (12 Stats., 411), which makes it the duty of the Secretary of War, the Secretary of the Navy, and the Secretary of the Interior, to require every contract made by them severally on behalf of the Government, or by officers under them appointed to make such contracts, to be reduced to writing and signed by the contracting parties, is mandatory, and in effect prohibits and renders unlawful any other mode of making the contract. The case of *Garfielde* vs. *The United States* (reported in 93 U. S. Rep., 242), has no application here, because in that case the contract was with the Post-Office Department.

3. It does not appear from the findings of fact that there was any written evidence of what the Department would demand. There is nothing said in the correspondence as to when the plans should be furnished nor when the boilers should be completed. In any action, therefore, by either party, resort would be necessary to parol evidence to ascertain what it was that the claimants had agreed to furnish, and what it was that the United States had agreed to receive. The rule is well settled that every agreement which is required to be in writing by the statute of frauds must be certain in itself, or capable of being made so by a reference to something else whereby the terms can be ascertained with reasonable precision, or it cannot be carried into effect. In Brodie *vs.* St. Paul (1 Ves., Jr., 326) Mr. Justice Buller says:

> If the agreement is certain, and explained in writing signed by the parties, that binds them; if not, and evidence is necessary to prove what the terms

> were, to admit it would effectually break in upon the statute and introduce all the mischief, inconvenience, and uncertainty the statute was designed to prevent.

In Bailey *vs.* Ogdens (3 Johns., 398) it is said:

> The form of the memorandum may not be material, but it must state the contract with reasonable certainty, so that the substance of it can be made to appear and be understood from the writing itself, without having recourse to parol proof.

The attention of the court is invited to the case of Henderson *vs.* The United States (4 Ct. Cls., p. 75), which contains a full discussion of the wisdom and propriety of such legislation as is involved here, showing the necessity and importance of a strict enforcement of these statutes by the courts.

Very respectfully,

JOHN GOODE,
Solicitor-General.

No. 1

Brief

118 43

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible].

ELIZABETH T. OAKLEY *Plaintiff in Error.*

vs.

EDWARD K. GOODNOW, *Defendant in Error.*

Record agreed upon for the purpose of trying Motion to dismiss writ, or to affirm the judgment.

C. H. GATCH, *for Plaintiff in Error.*
GEORGE CRANE, *for Defendant in Error.*

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

ELIZABETH T. OAKLEY *Plaintiff in Error.*

VS.

EDWARD K. GOODNOW, *Defendant in Error.*

C. H. GATCH, *for Plaintiff in Error.*

GEORGE CRANE, *for Defendant in Error.*

Argument on motion to dismiss writ of error or to affirm the judgment.

I.

For the purpose of this motion the parties to this suit have agreed upon a record which is attached to this brief. This case is wholly different so far as this motion is concerned from the other Goodnow cases now pending in this court. The sole and only question presented for the consideration of this court is based upon the refusal of the state courts to remove the cause to the federal court for trial. The petition for removal was in substance as follows:

> The petitioner, Elizabeth T. Oakley, respectfully shows that your petitioner is and was at the commencement of this suit, a citizen of the state of New York; that the plaintiff, Edward K. Goodnow, is only a nominal party to said suit, and has no interest therein whatsoever, but is prosecuting the same for the sole and exclusive use and benefit of the Iowa Homestead Company and Dubuque and Sioux City Railroad Compny, which were at the commencement of this suit, and still are, corporations created and existing under and by virtue of the laws of the state of Iowa, and having its

principal place of business in said state of Iowa, which said railroad and homestead companies directed the commencement of said suit, employed counsel to prosecute the same, and are directing and controlling its prosecution. Record 5

That the amount in controversy herein, exclusive of costs, exceeds the sum of five hundred dollars; that said controversy is wholly between your petitioner and the Iowa Homestead Company and Dubuque & Sioux City Railroad Company, the said plaintiff having no interest therein whatsoever.

At the instance of the plaintiff in error, the Supreme Court of Iowa made the following decree or certificate:

And it is further certified and ordered to be made part of the record herein that on the hearing of said cause the defendant claimed that this court had not jurisdiction to hear and determine the same, because, as was claimed, under and by virtue of the provisions of the act of congress of March 3, 1875, for the removal of causes from state to federal courts, by the petition, bond and other proceedings of defendant for removal filed and had in the circuit court of Webster county, Iowa, from which the same came by appeal to this court, the same was removed from said circuit court to the United States Court for the district of Iowa, central division. That our decision herein was and is that said cause was not thereby removed, and, under the provisions of said act of congress, was not thereby removable, and that this court had jurisdiction thereof to hear and determine the same on such appeal, and therefore was and is against the immunity so claimed. Record 9

II.

It will be observed that the sole ground upon which the jurisdiction of this court is claimed, is the refusal of the state court to order the cause to be removed to the federal courts for trial. The petition for removal sets forth no ground therefor except the fact that Goodnow is not the real party in interest, and that other persons directed the commencement, and have since controlled the prosecution of the suit. The most that can be said of these allegations is that they constitute a valid plea in abatement of the suit. But they certainly, in no sense, constitute a ground for a removal of the cause to the federal courts, and hence raise no federal question.

Providence Savings Society vs. Ford 114 U. S. 635.

III.

Admitting that the record raises a federal question, still in as much as the decision of the state court falls strictly within the precedents of this court, the motion to affirm should be granted.

Swope vs. Leffingwell 105 U. S. 3.

IV.

In behalf of the defendant in error, we insist that the writ of error in this case was taken solely for delay, that the question on which the jurisdiction depends, is so frivolous as not to need further argument, and that for these reasons the cause ought to be affirmed, even though the question raised be of a federal character. The record shows that a bond was given to delay proceedings on the judgment of the inferior court. The writ of error having been sued out merely for delay, the defendant in error is entitled to damages at the rate of ten per cent on the amount of the judgment. Pennywit vs. Eaton 15 Wall. 380.

All of which is respectfully submitted.

GEORGE CRANE,
Attorney for Defendant in Error.

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

ELIZABETH T. OAKLEY *Plaintiff in Error.*

VS.

EDWARD K. GOODNOW, *Defendant in Error.*

C. H. GATCH, *for Plaintiff in Error.*
GEORGE CRANE, *for Defendant in Error.*

Record agreed upon for the purpose of trying Motion to dismiss writ, or to affirm the judgment.

On the 3d of May, the plaintiff filed his petition in the circuit court of Webster county, Iowa, stating his cause of action as follows:

PARAGRAPH 1. The plaintiff, Edward K. Goodnow, claims of the defendant twelve hundred dollars, and for cause of such claim says that the Iowa Homestead Company, in the year 1860, received from the Dubuque & Sioux City Railroad Company, which company claimed under an act of congress of May 15, 1856, to aid in the construction of railroads in the state of Iowa, a deed duly executed and delivered by said railroad company purporting to convey in fee simple absolute to said Homestead Company, the following real estate, that is to say: All of section 11, in township 89, north of range 28, west of the 5th P. M., in said county of Webster, state of Iowa.

PAR. 2. That from and after the execution and delivery of said deed, till the year A. D. 1873, the said Iowa Homestead Company honestly and in good faith believed itself to be the absolute owner of said lands; but in the year 1873 the Supreme Court of the United States, in a suit therein pending for the purpose of testing the right and title of said Homestead Company to said lands, decided finally that said company was not the owner thereof, and had never had any right or title thereto, since which time said company has not claimed to be the owner of said lands, or to have any interest therein.

Par. 3. That during the several years, from 1860 to 1873, the county of Webster, a municipal corporation under the laws of Iowa, duly levied and assessed upon said lands taxes amounting in the aggregate to twelve hundred dollars, or about one hundred dollars for each and every year during said time. That said Iowa Homestead Company believing itself to be the *bona fide* owner of said land, gave or delivered over to said county all the taxes so levied and assessed upon said land for the several years aforesaid.

Par. 4. That the taxes so levied and assessed upon said land became, and were a valid lien thereon in favor of said county, which said lien was superior and paramount to all other liens and incumbrances thereon.

Par. 5. That since 1860 the defendant and her ancesters have been the absolute owners of said lands, but of the defendants and her ancestor's said ownership the plaintiff and the Iowa Homestead Company had no knowledge or notice at the time of receiving its said deed, nor until the year A. D. 1873, and long after payment of said taxes.

Par. 6. That said defendant and her said ancestors in the year 1860, were, and have been continuously ever since then, non-residents of the state of Iowa.

Par. 7. That all the right to obtain or recover from defendant said taxes so paid or delivered over to said county during the years aforesaid, has been duly assigned, transferred and set over to the plaintiff, a copy of which assignment, marked exhibit "A," is hereto annexed and made a part of this petition.

Par. 8. That said defendant has never paid to said county nor to plaintiff, nor to plaintiff's assignor, the said taxes or any part thereof.

Par. 9. That said county has the legal right and power to collect said taxes from the said defendant, yet said county has always hitherto and still refuses to take any steps to collect said taxes, and has always hitherto refused and still refuses to refund the same to said plaintiff.

Wherefore plaintiff asks a decree against the said defendant for the said sum of twelve hundred dollars and interest thereon, that the same be made a special lien on the land above described from the time of the payment of said taxes, and that plaintiff have such other relief as equity and good conscience may require.

And on the 14th day of September, 1880, filed the following

AMENDMENT

to his petition:

Paragraph 1. That on or about the 15th day of May, 1856, the congress of the United States, by an act approved on that date, granted and conveyed to the state of Iowa, in trust, to aid in the construction of a railroad from the city of Dubuque, on the Mississippi river, across said state to a point on the Missouri river, near Sioux City, every altenate section of land designated by odd numbers, for six sections in width on each side of said road; and in case there was not enough land within said limits subject to said grant to make the full six sections of land for each mile of road to be constructed, then that said state should be entitled, within fifteen miles on either side of said railroad to so much land in alternate sections or parts of sections as should be equal to the amount of land in odd numbered sections within the said six mile limits as were not subject to the operation of said grant, and that to make a full grant of six sections per mile, said state became entitled to and received a proper certificate for all the odd numbered sections and parts of sections within the said fifteen mile limits that had not been sold or otherwise appropriated by the United States, and to which the rights of pre-emption had not attached.

PAR. 2. Plaintiff further says that on or about the 14th day of July, 1856 the said state of Iowa having duly accepted said grant and undertaken the trust therein declared by an act approved on that date, granted all of said lands to the Dubuque & Pacific Railroad Company, a corporation duly organized under the laws of said state, on condition that said company would build the railroad contemplated in said act of congress.

That afterwards, in August, 1860, the said Dubuque & Pacific Railroad Company sold, transferred and conveyed its said railroad and all its property of every kind and nature, including all its right, title and interest in and to its lands given or granted to it by said state of Iowa to aid in the construction of said railroad, to the Dubuque & Sioux City Railroad Company a corporation duly organized under the laws of Iowa, which said last conveyance was afterwards recognized, approved and assented to by the state of Iowa, a copy of which marked exhibit "A" is attached to this petition.

PAR. 3. Plaintiff further says that said railroad companies duly constructed said railroad according to the terms and requirements of said act of congress, and prior to the year 1861, earned all the lands designated or conveyed by the language of the granting clause of said act of congress, and lying or being situated on the east side of the Des Moines river in Webster county, Iowa.

PAR. 4. Plaintiff further says that from 1860 to 1873, the said Dubuque & Sioux City Railroad Company, under and by virtue of said grant of land and the construction of said railroad, honestly and in good faith believed it was the absolute owner of, and held a good and valid title during all the years of 1861 and 1862, and till the 12th day of November, 1863, to the following described lands, that is to say, the lands described in the original petition of which this amendment is a part.

All of which lands are in Webster county, Iowa, are designated by odd numbers, and are within the six and fifteen mile limits of said railroad, and without which said railroad grant did not amount to six sections per mile of railroad built.

But in the year 1873, the Supreme Court of the United States in suit therein pending, for the purpose of testing the right and title of the Iowa Homestead Company, a grantee of the said Dubuque & Sioux City Railroad Company to the land aforesaid, decided finally that neither said railroad company nor said Homestead Company was the owner thereof and never had any right or title thereto, since which time neither of said companies has claimed to be the owner of said land or any part thereof.

PAR. 5. That during the continuance of said belief and claim of ownership the said Dubuque & Sioux City Railroad Company paid to Webster county, a municipal corporation under the laws of Iowa, and within whose territorial limits said lands are situated, the taxes which were duly assessed and levied upon said lands by said county, that is to say, the amounts and at the dates following and for the following years respectively:

For 1861; paid October 31, 1866, $480.

For 1862; paid December 9, 1863, $240.

For 1863; paid January 20, 1864, $240.

PAR. 6. Plaintiff further says that the taxes so assessed and levied upon said lands became, and were a valid and binding lien thereon in favor of said county, which said lien was superior or paramount to all other liens or incumbrances thereon.

PAR. 7. Plaintiff further says that long prior to the assessment and levy of said taxes upon said lands the said defendant herein became and was the real owner thereof, and ever since has been such owner; but of defendant's said ownership said Dubuque & Sioux City Railroad Company had no knowledge or notice at the time of constructing said railroad nor till long after the payment of the taxes aforesaid.

PAR. 8. Plaintiff further says that said defendant has never paid to said county the taxes aforesaid or any part thereof, and that said county has always hitherto refused and still refuses to refund to said last named railroad company or its assignors the taxes so paid to said county by said railroad company as hereinbefore alleged.

PAR. 9. Plaintiff further says that said defendant is now and always has been a non-resident of the state of Iowa.

PAR. 10. Plaintiff further says that the said Dubuque and Sioux City Railroad Company has assigned, transferred and set over to the said plaintiff all its right, title and claim for all of said taxes, and the right to recover or obtain the same from the said defendant, a copy of which assignment, marked exhibit "B," is hereto attached and made part of this petition.

PAR. 11. Wherefore plaintiff asks judgment against the defendant for the sum of money heretofore prayed for, interest and costs of suit, that the same be made a special lien on the lands above described, and for such other and further relief in the premises as equity and good conscience may require, and to this court may seem meet.

EXHIBIT "B."

This agreement witnesseth: That in consideration of the covenants and agreements hereinafter mentioned, and to be kept, observed and performed by Edward K. Goodnow, of the city and state of New York, the Dubuque & Sioux City Railroad Company, a corporation organized and existing under the laws of the State of Iowa, has assigned, transferred, conveyed and set over, and by these presents does assign, transfer, convey and set over unto the said E. K. Goodnow, all the right, title, claim or demand, or cause of action either in law or equity which said railroad company may have against any person, company or corporation on account of or by reason of its payment to Webster county, in the state of Iowa, of any taxes assessed or levied by said county upon lands situated within the territorial limits thereof, and in which said railroad company heretofore had or claimed to have an interest or title, and especially all claims, demands and rights of action in law or equity which said railroad company may have or hold against any person, company or corporation by virtue of said railroad company having paid or handed over for 1861, 1862 and 1863 to said Webster county the taxes assessed or levied by said county upon the lands or any part thereof, formerly claimed by said railroad company as part of the lands granted by congress to aid in the construction of its railroad, and located within five miles of the Des Moines river, in said county, but which were finally adjudged by the courts to be no part of said land grant, and does hereby authorize the said E. K. Goodnow to enforce said claim, demands or right of action by suits in his own name. In consideration whereof the said E. K. Goodnow hereby agrees to use or exercise reasonable care or diligence to enforce said claims, demands or rights of action, and after deducting all costs and expenses in so doing, to hold the proceeds or amounts collected in trust for the use and benefit of the parties owning. Signed by the respective parties hereto.

E. K. GOODNOW,
THE DUBUQUE & SIOUX CITY R. R. CO.,
by M. K. JESUP, *President.*

On the 16th day of December, 1880, defendant filed the following

PETITION FOR REMOVAL

to the United States circuit court:

The petitioner, Elizabeth T. Oakley, respectfully shows that your petitioner is and was at the commencement of this suit, a citizen of the state of New York; that the plaintiff, Edward K. Goodnow, is only a nominal party to said suit, and has no interest therein whatsoever, but is prosecuting the same for the sole and exclusive use and benefit of the Iowa Homestead Company and Dubuque and Sioux City Railroad Compny, which were at the commencement of this suit, and still are, corporations created and existing under and by virtue of the laws of the state of Iowa, and having its principal place of business in said state of Iowa, which said railroad and homestead companies directed the commencement of said suit, employed counsel to prosecute the same, and are directing and controlling its prosecution.

That the amount in controversy herein, exclusive of costs, exceeds the sum of five hundred dollars; that said controversy is wholly between your petitioner and the Iowa Homestead Company and Dubuque & Sioux City Railroad Company, the said plaintiff having no interest therein whatsoever.

Your petitioner herewith files and tenders a bond with good and sufficient surety, conditioned as required by law, and prays the removal of said suit to the circuit court of the United States for the district of Iowa, central division, at the next term thereof, to be begun and held at Des Moines on the 9th day of May, 1881.

And on the same day the court admitting the sufficiency of the bond overruled and disallowed the petition for removal, and denied an order of removal, to all of which the defendant at the time duly excepted.

And on the 26th day of April, 1881, the plaintiff filed the following

AMENDMENT

and addition to his petition:

That the Iowa Homestead Company is a corporation duly organized and existing under the laws of the state of Iowa; that on or about the 12th day of November, A. D. 1863, the said homestead company received from the Dubuque and Sioux City Railroad Company, a corporation also existing under and by virtue of the laws of the state of Iowa, a deed duly signed, executed and delivered by said railroad company, purporting to convey in fee simple absolute to said homestead company the following described real estate, that is to say: All of section 11, in township 89, north of range 28, west of 5th P. M., in said Webster county, state of Iowa.

PAR. 2. Plaintiff further avers that from and after the execution and delivery of said deed as aforesaid, till the year 1873, the said homestead company honestly and in good faith believed that it was the absolute owner of and held a good and valid title to the land aforesaid; but in the year 1873 he Supreme Court of the United States, in a suit therein pending for the purpose of testing the right and title of said homestead company to said lands, decided finally that said company was not the owner of said lands, and never had any right or title thereto, since which time said company has not claimed to be the owner of said land.

PAR. 3. Plaintiff further avers that during the continuance of said belief and claim of ownership the said homestead company gave or delivered over to Webster county, a municipal corporation organized and existing under the laws of Iowa, and within whose territorial limits said lands are situated, the taxes duly assessed and levied by said county upon said lands that is to say, the following amounts for the following years respectively:

For the year 1864	$128.00
For the year 1865	218.00
For the year 1866	264.00
For the year 1867	158.00
For the year 1868	190.00
For the year 1869	244.00
For the year 1870	295.00
For the year 1871	327.00

And took from said county receipts showing the amounts so handed over to said county.

PAR. 4. Plaintiff further avers that the taxes so assessed and levied by said county upon and against said lands became and were a valid and binding lien thereon in favor of said county, which said lien was superior and paramount to all other liens or incumbrances thereon. That on or about the year 1860, one Mary A. Litchfield became and was the owner of said lands; that afterwards the said Mary A. died and the lands aforesaid descended to and by the laws of inheritance became the property of defendant herein; that said defendant never paid any consideration for said lands or any part thereof, but received the same as her portion of the estate of said Mary A. Litchfield, but of the ownership of the said Mary A. Litchfield and the said defendant herein, the said homestead company had no knowledge or notice at the time of receiving its deed therefor, nor until about the year A. D. 1873, and long after the payment of said taxes.

PAR. 5. Plaintiff further avers that said defendant has never paid to said county the taxes aforesaid, or any part thereof, nor did said Mary A. Litchfield during her lifetime.

PAR. 6. Plaintiff further avers that said county has always hitherto refused, and still refuses, to refund to said homestead company or its assigns the taxes so given or delivered over to said county by said homestead company as hereinbefore alleged, and said county has always hitherto refused, and still refuses, to take any steps whatever to collect the aforesaid taxes from the said defendant, or any part thereof, or to enforce the lien given by law upon said land to secure the due payment thereof.

PAR. 8. Plaintiff further avers that the said Iowa Homestead Company has assigned, transferred and set over to said plaintiff, all the right, title, claim, demand or cause of action, either in law or equity, which said company may have had against said defendant or any other person on account of or by reason of the payment of said taxes to said county. A copy of said assignment, marked exhibit "B," is hereto attached and made a part of this petition.

Wherefore plaintiff asks judgment against said defendant for the sum of three thousand dollars and costs of suit; that the said judgment be made a special lien upon said lands; that so much of said lands as may be necessary be sold and the proceeds applied to the payment of said judgment, and that plaintiff have such other and further relief in the premises as equity and good conscience may entitle and to this court may seem meet.

GEORGE CRANE,
Attorney for Plaintiff.

On the 13th day of December, 1881, defendant filed her answer to the petition and amendments thereto.

DECREE:

EDWARD K. GOODNOW,
vs.
ELIZABETH T. OAKLEY.

This cause coming for final hearing, the plaintiff appearing by his attorney George Crane, and the defendant by her attorney, C. H. Gatch, was duly submitted to the court upon the pleadings, evidence and arguments of counsel and the court desiring to take cause under advisement, it was ordered with the consent of the parties to the suit that the decision of the court be rendered in vacation, and that the decree of the court be entered as of the 4th day of March, 1884

And the court having duly considered the pleadings, evidence and arguments of counsel, finds the issues in favor of the plaintiff, and further finds that the plaintiff is entitled to recover the sums of money paid by plaintiff's assignor and interest thereon from the times the several payments were made, and that he is entitled to a lien on the lands on which said taxes were paid.

It is therefore ordered, adjudged and decreed that said Edward K. Goodnow, plaintiff, have and recover the sum of $1,316.08, and interest at six per cent. per annum from the 4th day of March, 1884, and costs of suit taxed at———dollars, and that said claim for———dollars, and this decree or judgment is hereby made a special lien on the following described lands, to-wit: Section eleven in township eighty-nine (89), range twenty-eight (28), all in Webster county, state of Iowa, from the 28th day of April, 1873.

It is further decreed that a special execution be issued and that the land above described, or so much thereof as may be necessary, be sold thereunder according to law and the proceeds of such sale be applied in satisfaction of this decree, and that from and after said sale and the execution and delivery of the deeds made in pursuance thereof, the said Elizabeth T. Oakley be forever barred and foreclosed of all right and equity or redemption in and to said land and every part thereof, and be forever restrained from ever setting up or asserting any right or title thereto or therein.

Notices of appeal were served on the clerk of said court, September 2, 1884, and on Geo. Crane, plaintiff's attorney, September 1, 1884.

DECREE.

OAKLEY vs. GOODNOW. } Dec. 16. 1885.

This cause coming on for final hearing, and the court being duly advised in the premises, it is ordered, adjudged and decreed that the decree of the said circuit court be and is hereby affirmed.

CERTIFICATE.

And it is further certified and ordered to be made part of the record herein that on the hearing of said cause the defendant claimed that this court had not jurisdiction to hear and determine the same, because, as was claimed, under and by virtue of the provisions of the act of congress of March 3, 1875, for the removal of causes from state to federal courts, by the petition, bond and other proceedings of defendant for removal filed and had in the circuit court of Webster county, Iowa, from which the same came by appeal to this court, the same was removed from said circuit court to the United States Court for the district of Iowa, central division. That our decision herein was and is that said cause was not thereby removed, and, under the provisions of said act of congress, was not thereby removable, and that this court had jurisdiction thereof to hear and determine the same on such appeal, and therefore was and is against the immunity so claimed.

On the 17th day of February, 1886, the said Elizabeth T. Oakley lodged in the office of the clerk of the Supreme Court of Iowa, for said Goodnow, a copy of a writ of error from the Supreme Court of the United States, and also filed therein a bond according to law to stay all proceedings on the judgment or decree rendered by the state court.

118-43

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

ELIZABETH T. OAKLEY, Plaintiff in Error,

vs.

EDWARD K. GOODNOW, Defendant in Error.

Brief in Resistance of Motion to Dismiss.

C. H. GATCH, for Plaintiff in Error.
GEORGE CRANE, for Defendant in Error.

DES MOINES, IOWA:
P. C. KENYON, LAW AND COMMERCIAL PRINTER.
1886.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

ELIZABETH T. OAKLEY,
Plaintiff in Error,

vs.

EDWARD K. GOODNOW,
Defendant in Error.

C. H. GATCH, *for Plaintiff in Error.*
GEORGE CRANE, *for Defendant in Error.*

BRIEF IN RESISTANCE OF MOTION TO DISMISS.

The material part of the petition for removal, filed by the defendant, Oakley, is as follows.

> The petitioner, Elizabeth T. Oakley, respectfully shows that your petitioner is, and was at the commencement of this suit, a citizen of the state of New York; that the plaintiff, Edward K. Goodnow, is only a nominal party to said suit, and has no interest therein whatsoever, but is prosecuting the same for the sole and exclusive use and benefit of the Iowa Homestead Company, and Dubuque & Sioux City Railroad Company, which were, at the commencement of this suit, and still are, corporations created and existing under and by virtue of the laws of the state of Iowa, and having their principal place of business in said state of Iowa, which said railroad and homestead companies directed the commencement of said suit, and employed counsel to prosecute the same, and are directing and controlling its prosecution (record, 5).

That the amount in controversy herein, exclusive of costs, exceeds the sum of five hundred dollars; that said controversy is wholly between your petitioner and the Iowa Homestead Company and Dubuque & Sioux City Railroad Company, the said plaintiff having no interest therein whatsoever.

ARGUMENT.

The right of removal by the plaintiff in error, Oakley, depends upon the proposition that the Dubuque & Sioux City Railroad and the Iowa Homestead Companies, Iowa corporations, and not Goodnow, a citizen of New York, are the real plaintiffs.

Taking the averments of the petition for removal as true, which it is assumed the court will do, it will be conceded that the homestead and railroad companies are the real parties in interest, and that Goodnow has no interest whatever in, or control of, or right to control, the suit. The real question, therefore, is whether or not, the truth of these averments being assumed, the said companies, and not Goodnow, are within the meaning of the removal acts, the *parties* to the *controversy* as to which the removal was asked by plaintiff in error.

In *Farmington Village vs. Pillsbury*, 114 U. S., 138, this court, Waite, C. J., delivering the opinion, referring to former decisions of the court, says:

> Upon the question of transfer it was uniformly held that, if the transaction was real and actually conveyed to the assignee or grantee all the title and interest of the assignor or grantor in the thing assigned or granted, it was a matter of no importance that the assignee or grantee could sue in the courts of the United States, when his assignor or grantor could not. A suit by such an assignee or grantee would present, in reality, *a controversy* between the plaintiff on the record and the defendants (citing cases). But it was equally well settled that if the transfer was fictitious, the assignor or grantor continuing to be the real party in interest, and the plaintiff of record but a nominal or colorable party, his name being used only for the purpose of jurisdiction, the suit would be *essentially a controversy between the assignor or grantor and the defendant*, notwithstanding the formal assignment or conveyance, and that the jurisdiction of the court would be determined by *their citizenship* rather than that of the *nominal plaintiff*.

In *Barney vs. Baltimore City*, 6 Wall., 280, the question being whether in the case of a conveyance or assignment merely colorable, the real interest remaining with the grantor or assignor, the citizenship of the grantor or assignor, or that of the grantee or assignee, should be considered as determining the question of federal jurisdiction; it was held that it must be determined by the citizenship of the grantor or assignor. The court, on page 288, quotes, with approval, the following from the opinion in *Smith vs. Kernochen*, 7 How., 216:

> The true and only ground of objection in all these cases is, that the assignor or grantor, as the case may be, is the real party in the suit, and the plaintiff on the record but nominal and colorable, his name being used merely for the purpose of jurisdiction. The suit is then, in fact, *a controversy* between the *former* and defendants, *notwithstanding the conveyance.*

In *Browne, et al. vs. Strode*, 5 Cranch., 303, all of the persons named in the declaration as plaintiffs were justices of the peace of the county of Stafford, and all citizens of Virginia. The defendant was also a citizen of Virginia. The suit being for the benefit of parties *not citizens of Virginia*, on an executor's bond, given for the faithful discharge of his duties as executor, and executed to the justices in conformity with a statute of the state allowing suits thereon by them at the instance of any party aggrieved, it was held by the supreme court to be within the jurisdiction of the United States circuit court.

In *McNut vs. Bland*, 2 Howard, 10, it was held that a suit might be prosecuted in the United States circuit court, in the name of the governor of the state of Mississippi, he being a citizen of that state, for the use of a citizen of the state of New York against a citizen of the first named state, upon a sheriff's bond which, as required by the law of Mississippi, was executed by the sheriff and his sureties to the governor of the state, conditioned for the faithful performance of his duties as sheriff.

In *Goodnow vs. Litchfield*, 4 McCrary, 215, upon substantially the same averments in the petition for removal as are made in this petition, McCrary, circuit judge, in overruling a motion to remand, used this language:

It would hardly do to affirm that a citizen of Iowa may enter into a contract with a citizen of New York and, having incurred liability thereunder, may, thereafter, for the mere purpose of depriving such citizen of New York of his right to remove a suit upon such contract into this court, assign the contract, or the right of action arising thereon, to another citizen of New York, with an agreement that he shall prosecute the suit to judgment, and shall pay the costs and expenses of the litigation and pay the balance to the assignor who is to remain the *real litigant*. If this can be done then the laws of the United States conferring jurisdiction upon the courts of the United States in controversies between citizens of different states may be evaded and practically nullified by such colorable assignments.

At common law, and in the most, if not all of the states of the union, at the time of the adoption of the constitution, an action on a non-negotiable chose in action which had been assigned, was only maintainable in the name of the assignor, and this suit could then have only been prosecuted in the name of the assignor, and must as necessarily have been so prosecuted as were the Brown and McNut cases prosecuted in the names of the justices and governor respectively.

It is provided in the constitution of the United States that "the judicial power shall extend to *controversies* between citizens of different states."

The real controversy here is between the homestead and railroad companies, assignors of defendant in error, and Oakley, the plaintiff in error. It is only by having what the law recognizes as an interest in the subject matter in litigation, that any one can be a party to a controversy respecting such subject matter.

The real party in interest cannot, *by mere appointment*, constitute another person a party to a controversy in the sense of the above quoted provision of the constitution, nor can one be constituted a party to such a controversy by any state legislation. It is doubtless true that by statute a state may authorize suits to be prosecuted in the state courts, in the name of a person in no sense whatever interested in the subject matter of the suit, yet no one will pretend that this would constitute the person *a party to the controversy*, in the sense intended by the constitution and the removal acts. More is necessary than simply that a suit may be prosecuted in the name of a person to constitute such person a party to the controversy.

The assignment in question does not invest Goodnow with any interest in the cause of action, but on the contrary purports to be an assignment for collection only. It is recited that the assignment is "in consideration of the covenants and agreements hereinafter mentioned and to be kept, observed and performed by E. K. Goodnow;" and these covenants and agreements are, that Goodnow "shall exercise reasonable care and diligence to enforce said claims, demands or rights of action, *and after deducting all costs and expenses incurred in so doing, to hold the proceeds or amounts collected in trust for the use and benefit of the parties owning the same.*"

In the foregoing Browne and McNut cases, the actions, although in terms prosecuted for the use of the real party in interest, were not more so in effect than is this case prosecuted for the use of the assignors of defendant in error; and that this case is so prosecuted is just as apparent from the assignment, made part of the petition, as if the language contained in the title of the case and the petition were "Edward K. Goodnow *for the use,*" etc. What different relation do said companies sustain to this suit, considered either as parties to the record or with respect to the real controversy, than did the nominal plaintiffs therein to those cases? Neither of the suits named was more exclusively for the use of persons not parties to the record than is this, and the plaintiff in this, in contemplation of law, is no more interested in the subject matter or decision of the real controversy involved than were the plaintiffs respectively in those.

In Curtis' Jurisdiction of United States Courts, 119, after referring to the case of parties acting in a "representative capacity, as executors, administrators or guardians or trustees," it is said to be "settled that evidence that they act in a representative capacity, and that those whom they represent would not be competent themselves to sue, does not affect the jurisdiction of the court;" and it is added:

> On the other hand, if a person is not acting strictly in a representative capacity as executor, administrator, guardian or trustee, but is what is called *a mere conduit through which the money or property sued for is to pass to the third person*, that third person may bring the suit and it is of no consequence if this third person, to whom the promise was in form made, would not be competent to sue.

And the able author of this work, in his brief in the sewing machine case, 18 Wallace, 553, as reported on page 559, uses this language:

> There is a plaintiff and there is a defendant, and who the parties to that "case" or to that "suit" are, appears by the memorials kept in courts and known as the docket; but a party to the "case" or "suit" *may have little or no interest in the controversy*. A citizen of Pennsylvania may sue B., another citizen of Pennsylvania when B. is but a nominal defendant, and when the only person really interested as a defendant in the controversy is C., a citizen of New York, not a party to the *case* or *suit* at all; the "case" or "suit" is between A. and B.; the *controversy* is between A. and C.

Assuming all the averments of the petition to be true, Goodnow "is only a *nominal* party to the suit;" "has no interest therein whatever:" "is prosecuting the same for the sole and exclusive use and benefit of the Iowa Homestead Company and the Dubuque & Sioux City Railroad Company," *Iowa* corporations; the homestead and railroad companies "directed the commencement of the suit; employed counsel to prosecute the same; are directing and controlling its prosecution;" and the "controversy is wholly between" defendant and said homestead and railroad companies, and plaintiff has "no interest therein whatever:" the homestead and railroad companies were the parties plaintiff, and defendant was, on her petition, entitled to the removal asked for.

In *Vimont vs. C. & N. W. R. R. Co.*, 17 N. W. Rep., 31, the court, in the opinion on page 32, used this language:

> For the purposes of the opinion it might be conceded that the circuit courts of the United States may, in some cases, have jurisdiction on the

ground of citizenship, even where all the parties are citizens of the same state. Possibly this would be so where the petition showed that the plaintiff was a merely nominal and passive party, having no interest in nor right to control the litigation, though by reason of some provision of statute a legal party, and where also the petition showed who the person beneficially interested in and having the right to control the litigation was, and where the petition for removal showed the citizenship of such person to be such as would give the federal court jurisdiction if the person were the plaintiff of record. In such case it may be that a court would be justified in deeming the person beneficially interested and having the right to control the legislation as the real plaintiff, so far as the question of federal jurisdiction is concerned. As supporting such doctrine see *Brown vs. Strode*, 5 Cranch, 303, and *McNutt vs. Bland*, 2 How., 10.

It certainly appears from the averments of the petition here that plaintiff "was a merely nominal and passive party, having no interest in, nor right to control the litigation," and that the railroad company was the party "beneficially interested in and having the right to *control* the litigation."

The decision in the same case, 21 N. W. R., 9, is not in conflict with this, as it refers for support to decisions in suits by ordinary trustees, in which "the trustees in one sense are mere conduits; but as they *control the litigation* and are *legally the owners of the cause of action* they are entitled to maintain the action."

Defendant in error relies on the case of *Provident Savings Life Assurance Society vs. Ford*, 114 U. S., 635, as sustaining his claim that the facts relied upon as constituting ground of removal, if true, could only be taken advantage of by plea in abatement in the state court. That case is not an authority in this for the reason that the material facts in the two cases are essentially different. In that case, while it was alleged in the petition for removal that the assignment of the cause of action was "merely colorable," and that the plaintiff was "not the real party in interest," but that the assignor was in fact the real party in interest, it was not alleged, as in this case, that the assignee was "only a nominal party to said suit," and that the assignor "directed the commencement of the suit, employed counsel to prosecute the same, and is directing and controling it prosecution." It is respectfully insisted that these allegations, assuming them to be true, make Goodnow's assignor as essentially a real party to the controversy as were the three Virginia justices in the Brown-Strode case or as was the governor of Mississippi in the McNut-Bland case.

That there is a class of cases in which the citizenship of the party for whose use the action is prosecuted, and not that of the plaintiff *of record* determine the jurisdiction is settled by these Browne and McNut cases. On the other hand, it is equally well settled that in suits prosecuted by trustees and others acting in a fiduciary and representative capacity the citizenship of the trustee and not that of the *cestui que trust*, determines the jurisdiction, and the real question here is, to which of the two classes of cases is the case at bar most nearly assimilated.

Let it be assumed that the averments of the petition for removal, if true, constituted a defense to the action in the state court, but that it is also true that Goodnow's assignor in fact employed counsel, commenced the suit and is directing and controling it and is the real and only party to the controversy, why should the plaintiff in error, because this constituted a defense in the state court, be deprived of her right of removal by virtue of the same facts? In other words, if the assumed state of facts made her, within the meaning of the constitution and acts of congress, a real party to the controversy, why might she not claim her right of removal consistently with the concession that she might instead have plead and relied upon that as a defense to the action?

The assignment in this suit (record, p. 5), after reciting other agreements on the part of Goodnow, concludes as follows:

> And after deducting all costs and expenses in so doing, to hold the proceeds or amounts in trust for the use and benefit of the parties *owning* the same.

If the assignors of defendant in error continued to *own* the cause of action and the prospective results of the litigation they were certainly the real and only parties to the *controversy*. If the action was successful *they* were the persons benefited; if unsuccessful the loss affected *them alone*. Certainly under the language and intent of this assignment we have exactly the case referred to by Curtis, *supra*, where the nominal plaintiff is a "mere conduit through which the money or property sued for is to pass to the third person." It surely never was intended that the right of a party to have his controversy determined in the federal court should be defeated by a merely *nominal* assignment which *contemplates* that the assignor remain the *owner* of the cause of action and results of the litigation, and that the assignee shall never at any time be other than "a mere conduit."

The constitution and acts of congress contemplate the trial of the *controversy* between Mrs. Oakley and the railroad and homestead companies—the real parties in interest—and not the *suit* or *case* between her and Goodnow, their assignee, who, upon the conceded facts, has no interest whatever.

C. H. GATCH,
For Plaintiff in Error.